

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ABIGAIL F. RANSOM, BONNIE *
KURZ, LORI A. HOPMANN, VERNON *
K. HENNEMAN, JR., and DANIEL *
W. OWINGS, Individually and *
On Behalf of All Others *
Similarly Situated, *
Plaintiffs, * Civil Action No.
v. * A:10-CA-857-AWA
*
M. PATEL ENTERPRISES, INC., * Jury Demanded
M. PATEL ENTERPRISES, INC. *
d/b/a PARTY CITY, M. PATEL *
ENTERPRISES, INC. d/b/a PARTY *
PIG SUPERSTORE, MITESH M. *
PATEL, and JAYMINI AMIN, * November 14, 2011
a/k/a JAYMI PATEL, *
Defendants. * Austin, Texas

EXCERPT OF TRANSCRIPT OF TRIAL
THE CLOSING ARGUMENTS FOR BOTH
PLAINTIFFS AND DEFENDANTS
BEFORE THE HONORABLE ANDREW AUSTIN
UNITED STATES MAGISTRATE JUDGE
AND A JURY

APPEARANCES:

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1 APPEARANCES(cont.):

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6 (Proceedings recorded by mechanical stenography,
7 transcript produced by computer)
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1 (Closing Arguments)

2 THE COURT: All right. With that, I will
3 recognize the Plaintiff.

4 MR. MORELAND: Thank you, Your Honor.

5 Good afternoon. Fair pay for long hours.
6 That's what this case is about. It's what I told you it
7 was about during opening statement. Fair pay for the
8 long hours that the Plaintiffs worked to help make the
9 Defendants' business profitable. That's what this case
10 is about.

11 Before I get to the specific evidence in
12 this case, let me put into perspective the long hours
13 that the Plaintiffs worked for the Defendants. I have
14 on the screen Plaintiffs' Exhibit 1, P-1. If you look
15 in the lower right-hand corner, you'll see that number
16 8,088.27 hours. That is the amount of time for which
17 the Plaintiffs are, in this case, seeking their fair
18 pay. Now, what does 8,088.27 hours mean?

19 Just to put it in perspective, there are
20 about -- well, there are 8,760 hours in a single year.
21 8,088.27 hours is 12:01 a.m. from January 1st until at
22 least December 3rd of a single year and every moment in
23 between. That is the time. That is the amount of time
24 that the Plaintiffs in the case are seeking their fair
25 pay. And as the evidence has proved and that I will

1 discuss here in a moment, the Plaintiffs were managers
2 only at the Defendants' convenience and they were
3 managers largely in name only.

4 Now, before I get to the evidence that
5 proves that, even though the Defendants have the burden
6 of proof, I will discuss the evidence that proves that,
7 I want to thank you for being here. I know that being
8 here over the last week has taken a heavy toll on some
9 of your schedules, but I also know that that kind of
10 generosity that y'all have shown to both sides in this
11 case is exactly the type of generosity that the
12 constitution anticipates and it's exactly the type of
13 generosity that the constitution anticipates to preserve
14 this right, the right to trial by jury, that some of the
15 founders thought was more important than the right to
16 vote for a healthy democracy. So the Plaintiff's team
17 on behalf of Ms. Ransom, Ms. Hopmann, Ms. Kurz, Mr.
18 Henneman, Mr. Owings, and the 11 other people that they
19 represented in this case, we thank you for your time.

20 Now, I would like to review some of the
21 evidence y'all have heard this week. I'm not going to
22 review it all. And we believe that the evidence proves
23 that the Plaintiffs' primary job duty -- and that's the
24 main issue y'all are going to be called on to decide --
25 the Plaintiffs' primary job duty was not management of

1 Defendants' enterprise. If Plaintiffs were managers,
2 they were managers at the Defendants' convenience. And
3 I'm going to use that charge that the Judge has read to
4 you, excepting the typo, and I will use it as a road map
5 to discuss what I think is the more important and more
6 telling evidence in the case, if I can just take a few
7 more minutes of your time.

8 First of all, make no mistake about it.
9 The Defendants have the burden to prove in this case
10 that the Plaintiffs were plainly and unmistakably --
11 those words are very important -- that the Plaintiffs
12 were plainly and unmistakably executives exempt from the
13 protections from the Federal overtime and minimum wage
14 laws in this country. And the law does that on purpose.
15 They want to make it hard on Defendants not to pay
16 people overtime and minimum wages. And the Defendants
17 have not carried that burden of proof in this case.

18 First, before I get to the more specific
19 issues in the case, let me just point out that the title
20 of the position in this case is Executive Manager.
21 Obviously, job titles alone aren't enough. The Judge
22 has instructed you on that, and that's on page 6 of your
23 charge. Job titles alone were not enough, so this would
24 be an easy case because they are Executive Managers.
25 That's what the Defendants call them. But y'all can't

1 go -- or y'all -- the Judge has instructed you not to
2 look just at job titles. You have to look at what my
3 clients were doing on a day-to-day, on a week-to-week
4 basis and what they were, in fact, doing. Not what the
5 District Manager has speculated on what they should be
6 doing. And along these lines, you should place a major
7 emphasis on the Plaintiffs' job duties as a whole as the
8 Judge has instructed you to do so on page 6 and we
9 discussed this during opening statement a little bit.

10 Now, the Judge has given you some
11 instructions to determine what primary duty means and
12 what y'all are going to be called on here to decide this
13 afternoon. And the Judge has listed a number of
14 management duties. I'm not going to go through them
15 all. Y'all have heard all the testimony of all the
16 Plaintiffs and all the Defense witnesses in the case and
17 I don't think -- I know that the Plaintiffs did not
18 perform all those management duties that are listed
19 there in the Court's charge to the jury. In fact, I
20 don't think they performed most of those duties. And to
21 the extent that they have, you heard the Plaintiffs.
22 They spent precious little time doing so.

23 They did do some of them, no doubt; but
24 they spent precious little time doing so. Some of the
25 Plaintiffs disciplined. You heard Ms. Hopmann and

1 Ms. Mosley. They were told we couldn't discipline at
2 all. Now, the major point here is that the Plaintiffs
3 spent precious little time doing those few management
4 duties that they did, in fact, do that are listed in the
5 Court's charge. And you also heard all the Plaintiffs
6 who testified about this, testify that I spent more of
7 my time doing janitorial work than the management duties
8 that the Court has listed for you in this charge.

9 Now, the Court has also asked you to
10 apply four factors. It says you may apply these four
11 factors. And you can find these on pages 6 and 7 of the
12 charge. And it says these factors include but are not
13 limited to four areas, and I'm going to discuss those
14 four areas for you, if I may, and draw the evidence into
15 those four factors very briefly. Now, I'm not going to
16 discuss them necessarily in the order that the Judge has
17 given you; but let me just go through them, if I may.

18 The amount of time spent performing
19 exempt work. That's one of the factors that the Judge
20 has -- the Court has instructed you to use to determine
21 whether or not the Plaintiffs were -- the Plaintiffs'
22 primary job duties were management of the Defendants'
23 enterprise. You heard the evidence. You heard from
24 Mr. Wernli. You heard from Ms. Williams. Two
25 third-party witnesses. The Plaintiffs spent 80 percent,

1 90 percent, up to 95 percent according to Ms. Williams,
2 95 percent of their time performing non-management
3 work -- cleaning bathrooms, cleaning windows. The
4 Defendants tried to claim that sometimes you may see the
5 Plaintiffs cleaning a window, but I think they're
6 actually training somebody to do that. Do you remember
7 that testimony?

8 Now, the second factor that y'all are to
9 apply is the relative importance of the exempt versus
10 the nonexempt duties. And the evidence and the
11 testimony we've presented in this courtroom I think
12 shows you and I think you know what the primary -- what
13 the most important thing that the Plaintiffs did in this
14 case was to fill in the gaps, to pick up the slack, to
15 finish all the work that the hourly employees could not
16 finish. Why? Because the Defendants budgeted too few
17 payroll hours of the hourly employees to do that. And
18 they expected -- that's their word. It is the
19 expectation of Party City that the Executive Managers
20 and other salaried management should finish that work,
21 no matter how long it took.

22 That was the most important thing that my
23 clients -- that is the most important duty that my
24 clients performed for the defendants in this case.
25 After all, you heard Mr. Patel testify today that the

1 work of the Executive Managers did not help them make
2 5 million, 5.5 million, 6 million, or 6 and a half
3 million over the last several years. The Plaintiffs
4 were managers only at the Defendants' convenience.

5 You also heard testimony that hourly
6 employees -- Assistant Managers, Front-end Managers,
7 they could do many, most if not all -- well, most.
8 We'll talk about the ones they didn't do. They did
9 almost every single job that the Defendants now claim
10 make the Plaintiffs exempt executives. Executives
11 exempt from the protections of Federal law. Now, the
12 only thing the Assistant Managers and Front-end Managers
13 could not do was hiring, firing, interviewing,
14 scheduling, maybe disciplining. I think they had to
15 have somebody there. I think that's what the testimony
16 was. They had to have an Executive Manager or higher
17 there.

18 Well, you heard the testimony about how
19 often they hired and fired. Mr. Owings had been there
20 for almost four years, "I fired one person in four
21 years." They spent precious little time doing these
22 things. The only things that the hourly Assistant
23 Managers could not perform -- and Crystal Waters, you
24 heard her testify she could do everything that the
25 salaried management could and she was hourly, when she

1 could do every single one of those job duties.

2 The third factor that you should consider
3 in determining whether or not the Plaintiffs' primary
4 job duties was -- primary job duty was management of the
5 Defendants' enterprise, is their relative freedom from
6 direct supervision. And I'm not going to go over the
7 planners and checklists and to-do lists that y'all have
8 heard about a lot over the last few days. If you care
9 to look at them, they're Plaintiffs' Exhibit 19 through
10 35. But the evidence in the testimony is pretty clear.

11 Ms. Amin admitted that the Plaintiffs
12 were required to follow these documents to a T. To a T.
13 And these documents pretty much dictated and regimented
14 what the Plaintiffs were supposed to be doing on a
15 minute-to-minute, hour-to-hour basis. And they had to
16 follow them to a T. Ms. Tomasek testified they had to
17 follow them to the T. Getting back to relative freedom
18 from direct supervision, the Plaintiffs were also
19 micromanaged. You heard the testimony about that.

20 You heard the testimony about how they
21 received constant e-mails, constant telephone calls from
22 upper management telling them how to do their job, how
23 to do their job better, what they were doing wrong. And
24 how did they do that? Through the extensive
25 surveillance camera system that was installed in all

1 three of the Defendants' stores that Ms. Tomasek
2 testified was installed probably or used probably more
3 often for personnel matters than for security and
4 shrink. Probably more often for personnel matters than
5 security or shrink, they used this camera system
6 installed in all three stores. Ms. Amin taught
7 Ms. Tomasek how to use this camera system and told her
8 that it was to be used for personnel matters.

9 Now, the fourth factor that you are to
10 consider is the relationship of the Executive Manager's
11 salary to the wages of a comparable hourly employee.
12 And to our way of thinking, the comparable hourly
13 employee here is this Assistant Manager position that
14 reports directly to the Executive Manager. And you
15 heard Mr. Gilbertson testify that the Assistant Manager
16 position, he hired a woman named Liz Creme into that
17 position. Hired her at \$10 an hour, maybe 10.50 an
18 hour. Let's just use \$10 an hour to make this
19 comparison.

20 Now, you also heard six of the Executive
21 Managers testify about their effective hourly rate. You
22 heard Mr. Henneman testify that he his effective hourly
23 rate was \$7.49 an hour. He was a salaried manager
24 making \$7.49 an hour averaged out over his employment.
25 Ms. Kurz made about \$14.21. But averaging all six of

1 these Plaintiffs together, all six of these Executive
2 Managers who testified, I come up with an average of
3 about \$11.23 an hour across all six whose testimony you
4 have before you. That is a difference, \$11.23 minus 10,
5 \$1.23 more per hour is that the Plaintiffs made over an
6 hourly employee doing largely the same job duties.

7 Now, the Defendants are going to try to
8 get you to do another comparison. I've given you an
9 hour-to-hour comparison. How much one person makes per
10 hour compared to how much another person makes per hour.
11 Now, that is an apples-to-apples comparison. I don't
12 know of another way to compare time to time, other than
13 hour to hour; but I suspect the Defendants are going to
14 call on you to do it and I suspect it's going to be more
15 like an apples-to-lawn mower's comparison.

16 Now, I want to remind you of the last two
17 factors that I've just discussed -- the relative freedom
18 from supervision, the checklists, the micromanagement,
19 surveillance camera, and the \$1.23 per hour difference
20 between what the Executive Managers made per hour and
21 what the Assistant Manager made per hour. And I want to
22 draw your attention to one sentence in the Court's
23 charge. You're, of course, supposed to consider the
24 charge and use the charge as a whole; but there's one
25 sentence in there that's very important.

1 It reads at page 7: However, if such
2 Assistant Managers -- and such Assistant Managers refers
3 those Assistant Managers who are doing less than 50
4 percent, performing less than 50 percent non-management
5 work -- if such Assistant Managers are closely
6 supervised -- and the Plaintiffs here were -- and they
7 earn little more than nonexempt employees -- \$1.23 an
8 hour -- the Assistant Managers generally would not
9 satisfy the primary duty requirements.

10 That is the issue that the jury is being
11 called on here today to decide. Whether or not the
12 Plaintiffs' primary duty was management of the
13 Defendants' business. Now I ask that you, as a jury,
14 consider the evidence. The Executive Managers have
15 taken the stand. Many of them. This is a collective
16 action, so they're testifying on behalf of 11 other
17 folks in this case. The Executive Managers who have
18 testified, have taken the stand, have looked you in the
19 eye and told you what they've done on a day-to-day
20 basis.

21 The Defendants have done what I suggested
22 they might do in opening but there's a little twist.
23 They have taken snippets of what the Plaintiffs were
24 doing on a day-to-day basis and tried to convince you
25 that that is a full picture of what they were doing on a

1 day-to-day basis. Now, the twist is they repeated it
2 over and over and over again; apparently in hopes that
3 you would think that this picture that they're creating
4 is actually bigger than it is. Well, I know that you
5 know just saying stuff doesn't make it so. And I know
6 that you know that just saying stuff over and over and
7 over again doesn't make it any more so.

8 The Defendants have failed to prove that
9 the Plaintiffs were plainly and unmistakably executives
10 exempt from the protections of Federal overtime and
11 minimum wage laws. And if you agree and if you believe
12 that the evidence supports that conclusion, when you
13 retire to the jury room and you get this verdict form in
14 front of you, the Plaintiffs ask that you answer
15 Question No. 1 no. No, because the Defendants have
16 failed to carry the burden to prove that the Plaintiffs
17 were plainly and unmistakably exempt executives.

18 Now, the second question you're going to
19 be called on to ask -- to answer, excuse me, is whether
20 or not the Defendants' violations of the law, whether
21 their illegal failure to pay overtime and in some cases
22 minimum wages according to Federal law, was willful.
23 Now, the Judge has instructed you that willful just
24 means that they knew or -- knew they were violating the
25 law or showed reckless disregard for whether or not they

1 were violating the law. I think that's a fancy lawyer
2 way of saying that they knew or should have known that
3 what they were doing was just wrong. They knew or
4 should have known that what they were doing was just
5 wrong, and I think they did.

6 I think they knew or at least should have
7 known that what they were doing was wrong. It was a
8 violation of law. Why do I say that? First of all, you
9 heard testimony about the Defendants permitting and in
10 some cases insisting that folks work off the clock. You
11 heard Mr. Gilbertson testify about this. You heard
12 Mr. Gilbertson testify about Ms. Tomasek and Ms. Amin
13 walking into the location of Balconies, suggesting all
14 the work has to be done no matter how long it takes.
15 You heard Ms. Herrera testify. Jody Herrera, the
16 bookkeeper for five years for the Defendants, testify
17 that the Defendants were not to pay or that the hourly
18 Associates were not to be paid at overtime rates for
19 time worked over 40 hours.

20 Now, you also heard her testify that
21 Mr. Patel had instructed her to dock hourly employees
22 who worked five hours or six and a half hours, dock them
23 30 minutes because, my goodness, they could not be
24 working five or six and a half hours without taking a
25 break. Well, Ms. Herrera made sure that they were paid

1 for that if they did not take the break and when
2 Mr. Patel found out about it, he became angry. You
3 heard Ms. Herrera testify about this.

4 Now, stepping back for a moment to this
5 issue about the Defendants instructing Ms. Herrera not
6 to pay at overtime rates persons who work over 40, but
7 not quite 41. We're talking about 30 minutes here, 45
8 minutes there. Mr. Patel told Ms. Herrera not to pay
9 them at overtime rates. Now, you might be saying to
10 yourself, well, one person that's not a big deal. One
11 person one day, that's not a big deal. One person one
12 week, that's not a big deal. But if this was a -- if
13 this were a policy of the Defendants, they had as the
14 Defendants said 50 to 60 Associates working at them at
15 any one time and this happened every week and even half
16 of those folks went into overtime, that is a lot of
17 money that the Defendants are not paying for people to
18 work overtime.

19 So don't be fooled by the suggestion that
20 this is a de minimis mistake. That this is a minor
21 mistake. Now, how else do we know that the Defendants
22 knew or should have known that what they were doing was
23 wrong? Well, the Defendants paid overtime to the
24 Plaintiffs. They paid overtime to the Plaintiffs in
25 2007, they stopped in April of 2008, picked it back up

1 in October of 2008, and they stopped again and they
2 stopped again for good. Now, the Defendants have --

3 THE COURT: Ten minutes.

4 MR. MORELAND: Thank you, Your Honor.

5 The Defendants have spent a lot of time
6 trying to convince you that that overtime payment was
7 just a bonus. It was a bonus that we paid out of the
8 goodness of our hearts. That's what they've testified
9 to. Well, how do we know that's not right? Their own
10 check stubs call it an overtime rate. Mr. Patel's
11 testimony was back and forth, wavering on this point a
12 little bit. First he said that's the only way that we
13 know how to put it into the QuickBooks' system and I
14 don't really now how Ms. Herrera calculated it and then
15 later he said, well, I do know how Ms. Herrera
16 calculated it.

17 Now, we know it was overtime because the
18 Defendants called it overtime and they stopped it in
19 2008, according to Mr. Patel, because the economy was
20 caving in on us. That's what he said on this witness
21 stand under oath. The economy was caving in on us, and
22 we had to stop it. But remember, he had also testified
23 that they were making \$5 million in 2008, 5.5 million in
24 2009, 6 million in 2010, and they're projected to make
25 six and a half million gross revenue, according to what

1 he said last Monday, this year. The Defendants made
2 sure the economy did not cave in on them. What they did
3 was let the economy cave in on the Plaintiffs.

4 Final point on this question of did the
5 Defendants know or should they have known that what they
6 were doing was wrong; the DOL investigation that they
7 claim exonerates it from any liability in this case, the
8 DOL investigation ten years ago for another position for
9 another company. Now, Mr. Patel claimed they learned a
10 lot from the DOL investigation. Do you remember that
11 testimony? He said, "We learned a lot from it."

12 That investigation happened in 2001 and
13 2002. And I think, I think I heard him testify and
14 suggest that even though we learned a lot from
15 investigation in 2001-2002, we really didn't do much to
16 change that position until we got this franchise
17 agreement from Party City corporate in 2006 or 2007.
18 Now, if they really learned a lot and it was that
19 important, I don't know why it took them five or six
20 years to make any changes to this position.

21 Mr. Patel also testified that the only
22 thing he's done since then is to read the lawyerly
23 language on the DOL website, but apparently didn't hire
24 a lawyer to interpret it and he also testified -- I
25 think last Tuesday he came in and testified that I went

1 back and reread that because it was all over the news.
2 He repeated that again here today. I don't remember it
3 being in the news; but he said it was all over the news,
4 so I went and read it and I made sure that we increased
5 the weekly salary requirement to what it needed to be.
6 As far as I can tell, those are pretty much the only
7 things they've done since this DOL investigation to make
8 sure that what they were doing was in compliance with
9 the law. To make sure that they were paying all their
10 employees according to Federal overtime and minimum wage
11 laws.

12 The Plaintiffs have proved that the
13 Defendants knew or should have known that what they were
14 doing was wrong. And if you agree with this, if you
15 agree that the Plaintiffs have made that showing, the
16 Plaintiffs ask that when you get to Question No. 2 on
17 the verdict form, you answer that question yes.

18 Now, I think I have a few more minutes
19 here, Your Honor; is that correct?

20 THE COURT: You do.

21 MR. MORELAND: Six minutes left?

22 I will talk to y'all very briefly one
23 more time; but for now, I'm going to turn it over to
24 Mr. Welch. Thank you for your time.

25 MR. WELCH: Well, I've got a lot to say

1 in response. Let me just fill you in on how this works.
2 The Plaintiff gets to open the argument. I get to talk.
3 He gets a total of 30 minutes. I get a total of 30
4 minutes; but Mr. Moreland gets to reserve back five
5 minutes of time, and he'll speak to you again. I don't
6 get that privilege. I don't know what he's going to say
7 when he comes back; but undoubtedly I would have a
8 response, but I don't get the privilege of doing that.

9 Let me point out something really
10 quickly, if I could get -- did y'all switch it off?

11 MR. CASNER: I apologize. I thought you
12 were using yours.

13 MR. WELCH: Can I have some time added
14 back?

15 THE COURT: Of course.

16 MR. WELCH: Thank you.

17 All right, here we go. I don't know if
18 you picked up on this when the Judge was reading through
19 this.

20 And I'm going to kill this switch if
21 that's all right. It's only 30 minutes, if that's okay,
22 Judge?

23 THE COURT: Go right ahead.

24 MR. WELCH: Thank you.

25 There are four elements to this executive

1 exemption. You're only focusing on one of them. This
2 is page 5 of your charge. The only one you're focusing
3 on is B. If you'll pick up -- in this paragraph down
4 here, it says that A is admitted, C is admitted, and D
5 is admitted. In fact, when you look down here at the
6 bottom paragraph, you're therefore instructed that
7 Subsection A, C, and D have been established.
8 Accordingly, you should focus on Subsection B.

9 A is the salary. They were all paid the
10 minimum salary. C is the Plaintiffs customarily and
11 regularly directed the work of two or more employees.
12 And D is one we're going to hear about again in a moment
13 because it's found somewhere else in the charge, the
14 Plaintiffs had the authority to hire or fire other
15 employees and then it goes on to talk about or they had
16 the ability to recommend hirings and firings or
17 counselings or other changes in status and that they
18 were given -- those recommendations were given great
19 weight. That's going to come -- it's been admitted
20 here. It's been admitted for another element, too; and
21 I'm going to get to that.

22 But first, I want to talk about the
23 duties. Because remember I talked about this dumbing
24 down thing you were going to hear? The Plaintiffs are
25 going to try and dumb down the duties they had and as

1 you might expect, the Defendants are going to try and
2 dumb them up and that there were two objective sources
3 that were going to be brought in. The resumes from the
4 Plaintiffs, I'm going to look at two of those here; and
5 Ms. Patti Tomasek, who used to be our District Manager,
6 who has no stake in this lawsuit whatsoever. She left
7 of her own accord to take care of her mother in November
8 of this year and has no ax to grind in this suit, no
9 ongoing income, no nothing. She has nothing left to do
10 with Party City.

11 And if you remember, I couldn't even get
12 her to talk to me during the pretrial in this suit. I
13 had to subpoena her for her deposition, and she finally
14 came and spoke with me for an hour and a half. She's
15 not friendly to our side. She's probably not friendly
16 to their side. I think she's neutral. But let's walk
17 through the duties because that's what's important in
18 this suit. That is what you're going to be focusing on.

19 You've got a list of duties in the
20 charge. Remember I told you in opening, the Federal
21 regulations don't define what a managerial duty is.
22 This is a list of managerial functions. What it does is
23 it defines it by example. We didn't go through this,
24 but no one is going to dispute. I tried to get a
25 definition in the Plaintiffs' depositions. I didn't get

1 it. I didn't think I'd get it. I'm not sure I can come
2 up with one.

3 We have to look at the Federal
4 regulations, this stack of documents here, small print;
5 and you've got to go through there and go through a
6 bunch of definitions and figure out exactly what is --
7 what is a managerial duty. This charge you have, you've
8 got six pages of double spaced instructions that are
9 lifted, for the most part, directly from here. And you
10 can see the print on this. This is 25 -- and this isn't
11 all of them. You've got just six pages of it. What's
12 an employer supposed to do?

13 Well, they come to -- remind me this is
14 here. You're supposed to go down this list. All right,
15 here's the list. Interviewing, selecting, and training
16 employees. That's the top one. Remember I told you
17 that you would find that somewhere else in this charge.
18 Well, it says here -- remember on this prior page? It
19 says that that has been -- it's not in dispute. D is
20 already -- is not in dispute any longer. So we know
21 that they interviewed, selected, and trained employees.

22 Now, I've gone off this list. I've kind
23 of summarized it. Frankly, I didn't have the list in
24 the form it's in now when I put together my closing; but
25 here's what they did and I've categorized it and I've

1 put this in the category of the number of duties that
2 were dealing with scheduling, apportioning, planning,
3 and delegating the work. This is the same list that
4 you'll have in front of you. They scheduled the work.
5 Remember they drafted weekly schedule? They adjusted
6 the hours of work. Remember if you had deliveries
7 coming in, if you had planograms that needed to be done,
8 remember the weekly planners, they had all these
9 activities, they had to incorporate that in their weekly
10 schedules; so they did the weekly scheduling.

11 They evaluated employees for promotions,
12 demotions, and pay raises. They handle employee's
13 complaints and grievances. They disciplined employees.
14 How many counseling records did we go through? They
15 planned the employee's work. How the work was to be
16 done. They apportioned the work amongst the employees.
17 Remember the daily to-do list during the opening
18 procedures? They had this list of stuff that they had
19 compiled from the weekly planners -- corporate
20 directives; you know, do this planogram, assemble the
21 merchandise and put it where it's supposed to go; clean
22 the windows. That's delegating the work out to
23 employees. That's what they mean by apportioning the
24 work.

25 Supervising the work of employees. You

1 heard that even when they were working with them on a
2 task, that's what's called a concurrent duty. You saw
3 it mentioned in the charge. I'll cover it briefly.
4 Even when they were working with them, they were
5 supervising the employees. Maintaining production or
6 sales records for use in supervision or controls.
7 Remember all those reports that had to go out,
8 especially in the closing procedures? You've got the
9 overage and underage reports from the cash registers
10 that had to be reported. People were disciplined if
11 they were over or under on their registers. The
12 inventory reports that had to go out. Remember they did
13 this inventory auditing thing in the morning? It
14 included lows-and-outs, negatives on-hand, and you
15 had -- I think it was Ms. Ransom, it was one of the
16 Plaintiffs who talked about doing full inventories of
17 the entire store. That all had to be reported, but they
18 did those things.

19 And let me point out something from this
20 list. One, you do not have to find -- again, we're on
21 page 6 of the charge. You don't have to find that the
22 Plaintiffs did every single one of these duties. You
23 see how it says in determining whether the Plaintiffs'
24 primary duty consisted of management, you are instructed
25 that management includes but is not limited to

1 activities such as. Here are examples. You don't have
2 to fulfill every single one of these.

3 For instance, the very bottom one. I
4 don't think they did monitoring or implementing legal
5 compliance matters. I'm pretty certain we didn't hear
6 any testimony of that. But you don't have to do every
7 single one of those. Not only that -- and this is what
8 I'm about to get into -- you're not limited to that
9 list.

10 Mr. Moreland said that we engaged in
11 cherry-picking. He called it we reviewed the duties
12 they did in snippets. There was a reason I walked
13 through for three and a half hours on Thursday afternoon
14 with Ms. Tomasek exactly what these folks did. Remember
15 this list, this checklist with these dozens of items on
16 here -- opening procedures, closing procedures, counting
17 down the cash, remember that business? Reconciling the
18 cash registers, counting down the safe, approving cash
19 paid out, putting money in the safe from overnight,
20 putting cash register tills in the safe, again doing
21 counseling of cashiers who had underages or overages in
22 their accounts. I mean some of those counselings you
23 saw resulted in terminations, final warnings.

24 The e-mail reporting, I've already talked
25 about. Remember that long list of e-mails that had to

1 be formatted just correctly? Fourteen e-mails that had
2 to be sent out during the day, most in opening. Some in
3 closing. A lot had to do with helium counts. Do you
4 remember that? Helium and balloon sales makes up
5 10 percent of the revenue. Don't you think that that
6 e-mail reporting on the inventory is an important thing
7 to the business? All of these reports, all of these
8 things had to be done by the Executive Managers.

9 Now, you remember how often Ms. Tomasek
10 said the Executive Managers did that. Closing
11 procedures, I think was 50 percent. Opening procedures
12 were done 80 percent -- and I may have flipped that --
13 by the Executive Managers. And remember what happened
14 even if a manager was in the store, the Executive
15 Managers were the ones who carried this out. They're
16 the ones who made sure these procedures were
17 implemented.

18 What were some of these? You remember
19 the CRISP walk thing? Anybody remember that thing? I
20 have covered a fraction of what these people did.
21 Remember this? Oop, there we go. CRISP walk. Remember
22 this list? Of course, I had it up on my video screen at
23 the time. Look at this list of items. That's how they
24 come up with CRISP -- Clean and Bright, Recovered, In
25 Stock, Service, company -- it just goes on and on. I

1 could spend another day on this. You would have rioted
2 at that point, but I could have gone into even more
3 detail of what these folks were handling on a daily
4 basis.

5 They didn't go into that kind of detail
6 with you. Part of the dumbing down process. And I'm
7 not dumbing this up. This is -- these are objective
8 procedures that are found on checklists that have to be
9 done, and nobody denies that they were done. The
10 Plaintiffs admit these checklists had to be filled out.
11 Remember most of this CRISP walk stuff had to do with
12 fulfilling the corporate directives? Do you remember
13 that? And I'm going to touch on that in a minute, the
14 importance of the corporate directives to the business;
15 but we're focused on managerial duties right now.

16 Did these folks have sufficient number of
17 managerial duties? All those corporate planners, all of
18 the -- remember the weekly planners and the calendar and
19 the long list of things? I think they had intermittent
20 broadcasts during the week. You heard those
21 tangentially kind of mentioned. All of those get
22 incorporated by the Executive Managers into these daily
23 duties in two ways. Through the daily to-do lists where
24 they're apportioning out work to the various folks in
25 the morning and to be completed throughout the day, and

1 through scheduling. Because remember in the scheduling
2 function, the scheduling had to take into account truck
3 deliveries, changes in themes of the store. Remember,
4 for example, heard ad nauseam changing from the luau
5 summer theme to the Halloween theme. You had to change
6 out the entire store. Signage had to be changed.
7 Merchandise has to be changed. Remember they started
8 apportioning -- getting more hours to apportion out.
9 They started -- we heard Ms. Tomasek say this morning
10 they started out at 300 hours during the summer.

11 Apparently that's a slower time of the year. Then it
12 got bumped to about 400 hours during August. Then in
13 September, they're getting 500 hours to allocate out.

14 Remember Ms. Mosley? She was getting
15 those e-mails with Ms. Tomasek and she was getting more
16 and more hours to use during the week to get the work
17 done. And remember she was getting more and more
18 employees to do it with? They went from -- was it 20
19 employees up to 60? I'm going to address that in
20 another topic. You may be able to see where that's
21 coming from.

22 Then there were some of these smaller
23 things. Approving coupons, they had to approve coupons.
24 They had to go up there and make sure this was an
25 applicable coupon. I'll agree with you that's one of

1 the bigger managerial duties, but it's one of them. You
2 had price reductions. Remember for damaged items,
3 open-box items, they had to come up and approve those
4 kind of things and they had authority without
5 supervision from anyone else to change those prices.
6 Overseeing the wedding invitations. With all due
7 respect to the guy unloading the trucks in the back, he
8 can't sit down with the bride and determine what her
9 wedding invitations look like; so you have an Executive
10 Manager do those because they've got to be right.

11 The balloon and helium inventory control.
12 I've already kind of mentioned that. Made up 10 percent
13 of the store's revenue. The Executive Managers were in
14 charge of monitoring that inventory and ordering tanks
15 and reporting the level of inventory because that makes
16 up a huge amount of Party City's business. Now,
17 remember the list isn't a total list. So the question
18 is: Are all the things, the opening and closing
19 procedures that you don't see on that list, are they
20 managerial duties? Are the coupon issues? Are the
21 price reductions? Are the overseeing the wedding
22 invitations or the balloon and helium inventory control
23 procedure? Are any of those managerial duties. Should
24 they be on the list? Should the Government have put
25 them on the list?

1 The Plaintiffs, a Plaintiff got up on
2 each one of the things I just discussed and said, yes,
3 that is a managerial duty. And I knew they were going
4 to say yes. If you didn't pick up on it, I had deposed
5 them and they had already said yes and we had to
6 backtrack from time to time to confirm, you know, in
7 your deposition you said, yes, it was a managerial duty.
8 They have admitted, they have answered that question for
9 you as to those duties.

10 Ms. Tomasek said that she considered them
11 all to be managerial duties. But remember
12 Ms. Tomasek -- did you pick up on this -- she used to be
13 the -- I forgot her title. She supervised 130 stores
14 for Linens'n Things. And then she was demoted to
15 General Manager, not by her fault; but because we know
16 Linens'n Things is no longer with us. So she went back
17 down to manage a store. If anybody knows what a
18 managerial duty is, doesn't that woman? Linens'n Things
19 is a retail store just like we're talking about here,
20 and we're talking about retail stores.

21 Did you pick up on the instruction
22 concerning management of a retail location? I'll get to
23 that in just a moment, too. All right. Let's go back
24 to hirings, firings, counselings, that kind of thing.
25 It has been admitted that they hired and fired and that

1 they had the authority to do so or at the very least,
2 their recommendations were given great weight. It goes
3 to this element, also. Interviewing, selecting, and
4 training employees. Now, there's a reason with
5 Mr. Gilbertson I waded through in painful detail all the
6 hirings he had done. There's a reason I waded through
7 with Ms. Mosley all the hirings that she had done.
8 Remember she had to ramp-up one of the stores to get
9 ready for Halloween and hired -- she said 25 folks.
10 Ms. Tomasek I thought said she brought it from 20 up to
11 50. Regardless, somewhere between 25 and 30 employees.
12 Now, and I waded through those employment
13 forms. Remember where they signed off as manager and
14 all that. We didn't go over dozens and dozens of
15 similar forms with other Executive Managers. You're
16 going to have a stack -- I don't see them. There is a
17 stack -- there are a stack of exhibits that are going
18 back to you. You'll find them in there. You've see the
19 forms. Feel free to flip through those exhibits. I
20 would say there are several dozen of hirings, employment
21 forms, that we didn't even cover. I'm not threatening
22 you to go through the evidence. The evidence is done,
23 so we're not going to wade through them any more.
24 Primary duty, the question of whether or
25 not management is a primary duty. Let's go to page --

1 oh, here we are. We're on the page. This is what --
2 here is what the charge is going to have in it.
3 Considering whether an employee's primary duty involved
4 management, you are instructed that the term "primary
5 duty" means the principal, main, major, or most
6 important duty the employee performs.

7 I went through that with the Plaintiffs.
8 Remember I asked them: Did the managerial duties take
9 precedence over the non-managerial duties? They said,
10 yes, they would leave the non-managerial duty to go
11 handle the managerial duty. I used adjectives like was
12 that your primary duty, the managerial tasks over the
13 non-managerial? Yes. Were you on call -- remember
14 that -- to handle managerial duties versus
15 non-managerial duties? What was the primary reason you
16 were there? Isn't it true to handle managerial duties
17 over non-managerial duties? Yes.

18 Choose your adjectives. With
19 Ms. Tomasek, I went through those adjectives; and she
20 said, yes, the principal reason they were there was
21 managerial duties. It was the main duty. The major
22 duty. The most important duty. Nobody has said it
23 wasn't. We're arguing about how much they did, over
24 50 percent or not 50 percent. You know where I'm going.
25 It's in the charge, and I'll get there in just a moment.

1 Let's look at page 6. Oh, I'm sorry.
2 It's down here. In determining whether -- factors to
3 consider, do you see this? Factors to consider when
4 determining the primary include, but are not limited to,
5 relative importance of the exempt duties as compared
6 with other types of duties.

7 You know, all right. So they cleaned
8 baseboards. I don't doubt it. Did they clean the
9 bathrooms? I don't doubt it. I'm not calling Ms. Kurz
10 a liar. I'm not going to do that. They did it. I know
11 that because these guys did it from time to time.
12 Ms. Tomasek did it from time to time. It's just what
13 has to get done sometimes, but it is not the primary
14 reason they're there.

15 They are there to make sure the store
16 opens smoothly. They're there to make sure that
17 merchandise has been filled with the proper merchandise,
18 that it follows the weekly planners. They're there to
19 make sure that the signage is proper. They're there to
20 make sure that the theme has been changed over from
21 summer luau to Halloween or bat mitzvah to whatever.
22 That's what they're there to do. They're there to make
23 sure that the store closes smoothly. They're there to
24 audit inventory. They're there to audit cash. They're
25 there to send all these reports to upper management so

1 upper management knows what the heck is going on in the
2 store on a day-to-day basis. Remember they reported
3 sales, they reported their inventory auditing results.
4 They're there to make sure cash doesn't walk off. That
5 inventory doesn't walk off. They're there to hire
6 competent employees. I mean if you don't know what a
7 cashier does and you hire an incompetent cashier, the
8 person cashiering is not going to be able to cashier.
9 And if you can't cashier, you can't make money.

10 I mean this is a critical hiring. Does
11 is it get -- is there any more of a quintessential duty?
12 Is there anyone that's more important than actually
13 hiring for the business? It's mentioned twice in here.
14 It's one of the elements of the exemption and remember
15 it's already been determined and then you find it again
16 in the list of managerial duties. That's how important
17 it is. That's what they're there for. That's why
18 nobody below Executive Manager could do that because
19 it's important. They're there not to do baseboards or
20 set up planograms or unload trucks, and there's no doubt
21 they did that from time to time. They're there to
22 handle these managerial duties.

23 All right. Mr. Moreland has warned you
24 about this one. This is on page 7 of your charge. This
25 is one of the things you can look at in determining if

1 the managerial duties were their primary duties. The
2 relationship -- I've lost my copy. The relationship
3 between the employee's salary and the wages paid to
4 other employees for the kind of nonexempt work performed
5 by the employee. Mr. Moreland wants you to compare --
6 he wants to say, well, you're supposed to compare to the
7 nonexempt work that the Executive Managers were doing
8 that was like the Assistant Managers. No, those were
9 the Associates. They're cleaning baseboards and doing
10 the bathrooms and unloading the trucks.

11 And here's what they're getting at in
12 this. It took me a while to figure it out the first
13 time I looked at it. Here's what they're getting at.
14 Look at the salaries the Executive Managers are getting
15 paid. Here -- and I'll tell you what those salaries --
16 I'll give you a range of what they were. You might not
17 realize how much these folks were getting paid. Look at
18 their effective hourly rate. Remember Ms. Kurz I think
19 was making between \$14.20 an hour or \$15 an hour on
20 average, depending on what number of hours you used.
21 And compare that to the Associate who's getting 7.25 to
22 clean the baseboards, unload the truck, and set up the
23 planograms, also. That's the comparison.

24 So you ask yourself why is Ms. Kurz
25 getting paid twice as much -- and I talked about that a

1 bit -- why is she getting paid twice as much as the
2 Executive Manager? That's the comparison. That's what
3 this is about.

4 MS. PLOWMAN: Justin, ten.

5 MR. WELCH: Thank you.

6 Let me put the salaries in perspective.
7 I'm still on this wage -- I call it the wage disparity
8 issue. There are 16 Plaintiffs. Six of them, more than
9 a third, were making between 35,000 and \$46,000 a year.
10 Five of them were making, another third, between 27,000
11 and 32,000 a year. Five of them were kind of what you
12 could call your entry level Executive Managers. Five of
13 them made 25 grand a year. Now, compare that to the
14 hourly Associate.

15 Remember -- what did Ms. Tomasek say? It
16 was 80 or 90 percent, I don't remember which, of the
17 Associates were part time. They were working she said
18 25 hours a week. We heard from some other people it was
19 20. Let's take the 25. Seven times 25 is roughly \$175
20 a week and that's if they work 55 weeks a year and they
21 happen to max out at the 25 hours. I can't do the math.
22 175 times 52, I think Ms. Tomasek said it's somewhere in
23 the range of eight grand.

24 Well, you know, as an Associate you're
25 never going to be able to make the money of even the --

1 not even a fourth -- sorry, a third of the lowest paid
2 Executive Manager. There's a reason for that. And it
3 highlights the fact that the managers were getting paid
4 for their managerial duties. They're not getting paid
5 for the \$725 an hour -- for the \$7.25 an hour work that
6 they might do from time to time or even 35 percent of
7 the time or even 50 percent of the time.

8 Mr. Henneman found that out the hard way.
9 Did you pick up on that? He got demoted or demoted
10 himself because he didn't like working the number of
11 hours and then within a couple of weeks he went to
12 Ms. Amin, by his own admission, and said I would like to
13 re-up. He realized and he admitted to us -- I thought I
14 had the quote down here -- something along the lines of
15 I couldn't make as much money. Well, you couldn't make
16 close to as much money. And not only did he now have
17 the duties of -- remember he stepped down to Receiving
18 Manager, responsible for some of the trucks. He stepped
19 back up to the Executive Manager position and took on
20 both sets of duties.

21 Mr. Henneman, if you remember, was not
22 paid minimum wage sometimes; and I'll talk more about
23 this in a minute. He re-upped. He decided to take back
24 on the position again, knowing that sometimes he hadn't
25 received minimum wage; but he could make more money.

1 And remember if you're exempt, you're exempt from
2 overtime and minimum wage. And I'll just skip to this
3 last part. It cuts both ways. There are times you
4 might not get minimum wage. There are times when you're
5 going to get a lot more than minimum wage. Ms. Kurz, I
6 mean there were times she was making 16, 17, \$18 an hour
7 if you look when she worked under 55 hours. So it cuts
8 both ways.

9 Oh, on this wage disparity thing just to
10 finish up. The Plaintiffs would have you believe that
11 they promoted -- the Plaintiffs[sic] promoted Ms. Kurz
12 in order to get someone who could work an unlimited
13 number of hours so they don't have to pay them overtime.
14 Well, on Ms. Kurz' worst day she was getting 14.20 an
15 hour, twice minimum wage. If that were the Patels'
16 motive, that's not smart. Go hire a bunch of more
17 part-time folks at 7.25 an hour and with them, you just
18 hire a bunch more of them and they do the nonexempt work
19 and you don't have to mess around with classifying them
20 as exempt or nonexempt. You don't have to worry about
21 getting sued.

22 The Patels are smart folks. They started
23 out in 1984 with a 3,400 square foot store and have
24 grown it into what it is today -- 10,000, 12,000, and
25 25,000 square foot store. They just hire more Executive

1 Managers. All right, 50 percent of the time. This is
2 another one of these items. The amount of time -- this
3 is one of the factors in determining whether the job was
4 primarily managerial. The amount of time they spent
5 performing the exempt work. And there's an instruction
6 in there. I keep walking away from my machine here.
7 Where is that? Here we go, right here. What that says
8 is it doesn't -- time is something to look at, but it's
9 not the ultimate guide.

10 If you spend more than 50 percent of your
11 time performing work, it will generally satisfy that
12 requirement. Time alone, however, is not the sole test
13 and the FLSA does not require that exempt employees
14 spend more than 50 percent of the time. You can spend
15 less than 50 percent of the time doing managerial tasks
16 and still qualify. And that's the point. A hiring
17 procedure. When you bring someone in to interview them,
18 how long does it take? Someone said 10 minutes, 15
19 minutes. Let's say it's 20 minutes, whatever. That's
20 not that long, is it? But how critical is it to the
21 success of the business?

22 It's the importance of what you're doing
23 compared to the nonexempt tasks. That's what you look
24 at, and you go down here and you have an example. The
25 example is right under that. All right. Here's another

1 example. This is the one that is pertinent to this,
2 this case. An Assistant Manager in a retail
3 establishment, Party City, may perform work such as
4 serving customers, stocking shelves, and cleaning the
5 establishment; but performance of such nonexempt work
6 does not preclude the exemption is the Assistant
7 Manager's primary duty is management.

8 And that's the point. You're down there
9 helping them stock, the Associates; but you're
10 supervising them at the same time.

11 How long do I have?

12 THE COURT: You've got about three
13 minutes.

14 MR. WELCH: All right, let me skip -- I'm
15 going to have to skip some things. Remember, I don't
16 get to come back. The DOL audit, my first reaction when
17 I saw this case is what are we doing here? This has
18 already been decided by the Department of Labor, and it
19 wasn't decided by some field level investigator. It was
20 decided by the Director of Enforcement. Shouldn't that
21 just decide the issue, and it can.

22 Look back here. An employer's failure to
23 pay overtime or minimum wage is not willful if the
24 failure resulted from a good faith reliance upon a
25 decision of the Department of Labor. The Department of

1 Labor found these positions to be exempt. How does --
2 how do you get much more of a plain and unmistakable
3 statement than that of whether these should be exempt?
4 These regulations are thick. Shouldn't you be able to
5 rely on those regulations when determining if someone is
6 exempt? And it gets better here for the Patels.

7 In 2004, you had the changes. He looked
8 at the changes. It said it broadened who was exempt and
9 not only that, in 2007 with the franchise, they took on
10 all these additional duties. And I don't have time to
11 walk through those additional duties. We've looked at
12 them a bit already.

13 THE COURT: You've got one minute.

14 MR. WELCH: Oh, willfulness. Hourly
15 employs, all this business about shaving hours or not
16 paying overtime. Why are we talking about hourly
17 employees? This is about whether or not these Executive
18 Managers were exempt. Whether they should be exempt.
19 It's all misdirection. They should have talked about
20 the full-time, the exempt employees, the Executive
21 Managers.

22 Here is how I'm asking you to answer the
23 charge. Do you find that the Plaintiffs were exempt
24 from the overtime pay and minimum wage provisions of the
25 Fair Labor Standards Act? That's the question. Did

1 they have enough managerial duties to make them
2 managerial? Please answer yes. If you answer yes
3 there, you don't even get to the second question because
4 down here it says if you've answered no, then proceed to
5 Question 2. A yes means this case is over. Finally
6 it's over for the Patels who have spent hundreds of
7 thousands of dollars to defend themselves in this
8 lawsuit. Thank you.

9 MR. MORELAND: During opening statement,
10 I asked for you to judge the credibility of the
11 witnesses for yourselves, to listen to the evidence.
12 And I suggested that when you do so, that you would
13 agree with me that the Plaintiffs in this case,
14 Plaintiffs who punched in and punched out every day they
15 went to work for the Defendants, I said I think you will
16 agree with me that the Plaintiffs were managers at the
17 Defendants' convenience and that they were managers
18 largely in name only.

19 Well, I think you agree with me and I
20 think you know that it was very convenient for the
21 Defendants to call the Plaintiffs managers every two
22 weeks on payday because they had the Plaintiffs finish
23 all the work that the hourly folks didn't get to and
24 they didn't have to pay them extra for it. Very
25 convenient on payday. But do you know when it's most

1 convenient for the Defendants to call them managers?
2 Right now. Right before you get this case and decide
3 whether or not based on all the facts in the case, the
4 Plaintiffs were managers in fact or managers only at the
5 Defendants' convenience.

6 I think the evidence shows that they were
7 managers only at the Defendants' convenience. Managers
8 only in name only. And on behalf of the Plaintiffs in
9 this case, I ask that you return the verdict that we've
10 already discussed that will return the fair pay for the
11 long hours that the Plaintiffs have already given to the
12 Defendants. Thank you very much for your time.

13 (End of Closing Arguments)

14 REPORTER'S CERTIFICATION

15
16 I HEREBY CERTIFY that the foregoing is a true and
17 correct transcript from the stenographic notes of the
18 proceedings in the above-entitled matter to the best
19 of my ability.
20
21

22 _____/S/_____ July 10, 2012____

23 PAIGE S. WATTS, CSR, RPR Date
24 Deputy Official Court Reporter
25 State of Texas No. 8311
Expiration Date: 12/31/12